Malaysia Trustees Bhd & Ors v Sumatec Resources Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-52–02 OF 2017
NOORIN BADARUDDIN J
8 JANUARY 2018

Civil Procedure — Summary judgment — Striking out — Plaintiffs relied on common grounds to apply for summary judgment and to strike out defendant's defence and counterclaim — Whether existence of several serious triable issues made it inappropriate to allow the applications

The defendant in the original action herein, Sumatec Resources Bhd ('Sumatec') took loans from three lenders who later sold, transferred and assigned their rights, title and interests under their respective loan facilities with Sumatec to the second, third and fourth plaintiffs ('the issuers'). The issuers issued bonds and the first plaintiff, Malaysia Trustees Bhd ('MTB') was appointed to act as trustee for the bondholders. Sumatec initially entered into separate settlement agreements ('SAs') with the respective issuers in 2010. Those SAs were replaced by a settlement agreement in the year 2013 ('the 2013 SA') to which not only the issuers and Sumatec but also MTB and three others were parties. The three other parties were the fifth and sixth defendants — Hoe Leong Corp Ltd ('HLCL') and Setinggi Holdings Ltd ('Setinggi') — and Semua International Sdn Bhd ('SISB'). Sumatec contended that the 2013 SA was entered into to facilitate the sale of its shares in SISB to HLCL and Setinggi in return for their performing certain obligations towards settling Sumatec's debts to the issuers under the loan facilities. Although at the material time, Sumatec was indebted to the issuers in the sum of about RM80m as principal, a lower settlement sum of RM56m was agreed to under the 2013 SA. Sumatec alleged that the settlement of the RM56m was not wholly its responsibility but required the performance of certain obligations by HLCL, Setinggi and SISB. Sumatec contended that it had fulfilled its obligations under the 2013 SA but HLCL and Setinggi failed to observe theirs. The plaintiffs, on the other hand, contended that because Sumatec defaulted in paying the agreed RM56m, the plaintiffs had to enter into another agreement with Sumatec ('the 2015 SA') under which a new settlement sum of about RM24.5m was agreed to but when Sumatec again defaulted, MTB terminated the 2015 SA and demanded that Sumatec pay the full amount originally outstanding under the loan facilities which, by then, was in the region of more than RM72.3m. In the instant action by the plaintiffs, MTB applied both for summary judgment for the said original sum as well as to strike out Sumatec's defence and counterclaim. In resisting the applications, Sumatec contended that: (a) the 2015 SA was void and unenforceable for failure of consideration; (b) that only the 2013 SA was

enforceable but the plaintiffs were estopped from making any claim against Sumatec thereunder because HLCL and Setinggi had not performed their respective obligations thereunder; and (c) Sumatec had fully performed its obligations and was therefore fully released from any further obligations under the loan facilities.

Held, dismissing both the summary judgment and striking out applications:

(1) This was not an appropriate nor a plain and obvious case to allow the plaintiffs' applications without a full trial as serious triable issues were raised (see paras 37 & 44).

(2) Evidence had to be led to show why Sumatec and the plaintiffs entered into the 2015 SA and whether the plaintiffs, by their conduct, had brought about any variations or waiver to Sumatec's obligations. Sumatec's position needed to be ascertained via a trial to determine whether there was a failure of consideration for the 2015 SA or whether, if there was a breach of the 2015 SA, the parties were to revert to the obligations set out under the 2013 SA. The amount claimed by the plaintiffs was contested and the terms of the 2015 SA were disputed. It had to be determined whether the plaintiffs, by way of the 2013 and 2015 SAs, had waived any amount more than the settlement sum agreed to in the 2013 SA and whether Sumatec's contention that it had fulfilled its obligations under the 2013 SA was actually the case (see paras 37 & 41–42).

(3) An issue to be tried was whether the plaintiffs were estopped from claiming the full sum outstanding under the loan facilities as the proceedings involved HLCL and Setinggi by way of Sumatec's counterclaim. It was Sumatec's contention that HLCL, Setinggi and/or HLCL's nominees failed to fulfill their obligations to MTB under the 2013 SA and that Sumatec's obligations had been fully discharged (see paras 29 & 31–32).

[Bahasa Malaysia summary

Defendan dalam tindakan asal, Sumatec Resources Bhd ('Sumatec') telah mengambil pinjaman daripada tiga pemberi pinjaman yang kemudian telah menjual, memindah dan mengambil alih hak, hak milik dan kepentingan mereka di bawah kemudahan pinjaman mereka masing-masingnya dengan Sumatec kepada plaintif-plaintif kedua, ketiga dan keempat ('pengeluar tersebut'). Pengeluar tersebut telah mengeluarkan bon-bon kepada plaintif pertama, Malaysia Trustees Bhd ('MTB') telah dilantik untuk bertindak sebagai pemegang amanah untuk pemegang-pemegang bon tersebut. Sumatec pada mulanya telah memasuki perjanjian-perjanjian penyelesaian yang berasingan ('PPB') dengan pengeluar tersebut masing-masingnya pada 2010. PPB tersebut telah digantikan dengan perjanjian penyelesaian pada 2013

('PPB 2013') yang mana bukan sahaja pengeluar tersebut dan Sumatec tetapi juga MTB dan tiga yang lain adalah pihak-pihak. Tiga pihak lain adalah defendan-defendan kelima dan keenam — Hoe Leong Corp Ltd ('HLCL') dan Setinggi Holdings Ltd ('Setinggi') — dan Semua International Sdn Bhd ('SISB'). Sumatec berhujah bahawa PPB 2013 itu telah dimasuki untuk memudahkan jualan sahamnya dalam SISB kepada HLCL dan Setinggi sebagai balasan untuk melaksanakan obligasi tertentu terhadap penyelesaian hutang Sumatec kepada pengeluar tersebut di bawah kemudahan pinjaman. Walaupun pada masa material, Sumatec berhutang kepada pengeluar tersebut untuk sejumlah lebih kurang RM80 juta sebagai principal, jumlah penyelesaian yang lebih rendah iaitu RM56 juta telah dipersetujui di bawah PPB 2013 itu. Sumatec mengatakan bahawa penyelesaian RM56 juta itu bukan tanggungjawab keseluruhannya tetapi memerlukan pelaksanaan obligasi tertentu oleh HLCL, Setinggi dan SISB. Sumatec berhujah bahawa ia telah memenuhi obligasinya di bawah PPB 2013 tetapi HLCL dan Setinggi telah gagal untuk memenuhi obligasi mereka. Plaintif-plaintif, sebaliknya, berhujah bahawa oleh kerana Sumatec telah gagal untuk membayar RM56 juta yang dipersetujui itu, plaintif-plaintif terpaksa memasuki perjanjian lain dengan Sumatec ('PPB 2015') di mana jumlah penyelesaian baru lebih kurang RM24.5 juta telah dipersetujui tetapi apabila Sumatec sekali lagi telah gagal, MTB telah menamatkan PPB 2015 itu dan mengarahkan agar Sumatec membayar jumlah penuh baki asal di bawah kemudahan pinjaman itu yang mana, pada masa itu, telah melebihi RM72.3 juta. Dalam tindakan ini oleh plaintif-plaintif, MTB telah memohon penghakiman terus untuk jumlah asal tersebut dan juga untuk membatalkan pembelaan dan tuntutan balas Sumatec. Dalam menolak permohonan-permohonan itu, Sumatec berhujah bahawa: (a) PPB 2015 adalah tidak sah dan tidak boleh dikuatkuasakan kerana gagal berhubung balasan; (b) hanya PPB 2013 boleh dikuatkuasakan tetapi plaintif-plaintif diestopkan daripada membuat apa-apa tuntutan terhadap Sumatec kerana HLCL dan Setinggi tidak melaksanakan obligasi masing-masing; dan (c) Sumatec telah melaksanakan sepenuhnya obligasinya dan oleh itu dilepaskan sepenuhnya daripada apa-apa obligasi selanjutnya di bawah kemudahan pinjaman.

Diputuskan, menolak kedua-dua penghakiman terus dan permohonan-permohonan pembatalan:

(1) Ini bukan suatu kes yang sesuai atau biasa dan jelas untuk membenarkan permohonan-permohonan plaintif-plaintif tanpa perbiacaraan penuh kerana isu-isu serius yang perlu dibicarakan telah ditimbulkan (lihat perenggan 37 & 44).

(2) Keterangan perlu dikemukakan untuk menunjukkan kenapa Sumatec dan plaintif-plaintif memasuki PPB 2015 dan sama ada plaintif-plaintif, melalui perbuatan mereka, telah melakukan apa-apa perubahan atau penepian kepada obligasi Sumatec. Kedudukan Sumatec perlu

ditentukan melalui perbicaraan untuk menetukan sama ada terdapat kegagalan berhubung balasan untuk PPB 2015 atau sama ada, jika terdapat pelanggaran PPB 2015, pihak-pihak perlu merujuk balik kepada obilgasi-obligasi yang dinyatakan di bawah PPB 2013. Jumlah yang dituntut oleh plaintif-plaintif telah dipersoalkan dan terma-terma PPB 2015 telah dipertikaikan. Ia perlu ditentukan sama ada plaintif-plaintif, melalui PPB 2013 dan PPB 2015, telah mengetepikan apa-apa jumlah yang lebih daripada jumlah yang dipersetujui dalam PPB 2013 dan sama ada hujah Sumatec bahawa ia telahpun memenuhi obligasinya di bawah PPB 2013 adalah sebenarnya (lihat perenggan 37 & 41–42).

(3) Isu untuk dibicarakan adalah sama ada plaintif-plaintif diestopkan daripada menuntut jumlah penuh baki di bawah kemudahan pinjaman itu kerana prosiding melibatkan HLCL dan Setinggi melalui tuntutan balas Sumatec. Ia adalah hujah Sumatec bahawa penama-penama HLCL, Setinggi dan/atau HLCL telah gagal untuk memenuhi obligasi mereka kepada MTB di abwah PPB 2013 dan obligasi Sumatec telahpun dilaksanakan sepenuhnya (lihat perenggan 29 & 31–32).]

Notes

For cases on summary judgment in general, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9616–10630.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (refd)

Khairy Jamaluddin v Dato' Seri Anwar bin Ibrahim [2013] 4 MLJ 173, CA (refd)

Legislation referred to

Rules of Court 2012 O 14, O 18 r 19, O 18 r 19(1)(b), (1)(c), (1)(d)

Ramesh Sathasivam (Lew Chui Ying with him) (Adnan Sundra & Low) for the plaintiffs.

Ashok K Raman Nair (Rajasurian and Nur Farah Ain Faizul with him) (Nathan) for the defendant.

Noorin Badaruddin J:

[1] Malaysia Trustees Bhd ('MTB') filed two applications before this court. Vide a notice of application dated 27 April 2017 (encl 4), MTB as the first plaintiff in the original action applied for summary judgment against the defendant ('Sumatec') pursuant to O 14 of the Rules of Court 2012 ('the

ROC'). Subsequently vide a notice of application dated 12 May 2017, MTB applied to strike out Sumatec's defence and/or counterclaim pursuant to O 18 r 19(1)(b) or (1)(c) and/or (1)(d) of the ROC (encl 12).

FACTS

[2] Sumatec is a borrower of three loan facilities granted by three lenders whereby each of the lenders' rights, title and interests in and to the loan facilities ('facilities') had been sold, transferred and assigned to the second, third and fourth plaintiffs in the original action respectively as the issuers, who are all special purpose companies incorporated to issue asset-backed securities, namely bonds, pursuant to a primary collateralised loan obligations transaction. The bonds issued by each of the issuers are constituted upon the terms and conditions set out in the respective trust deed and MTB is the trustee appointed by the respective issuer to act as trustee for the bondholders.

[3] In connection with the facilities, Sumatec also entered into various agreements, trust deeds and deeds of assignments and three settlement agreements ('SA') namely, the Kerisma 2010 SA, CapOne 2010 SA and Prima Uno 2010 SA, all of which were superseded by a settlement agreement in year 2013 ('the 2013 SA').

[4] The 2013 SA dated 28 May 2013 was executed among MTB, the issuers, Sumatec, Hoe Leong Corp Ltd (the fifth defendant in the counterclaim) ('HLCL'), Setinggi Holdings Ltd (the sixth defendant in the counterclaim) ('Setinggi') and Semua International Sdn Bhd ('SISB').

[5] The 2013 SA was executed to document among others the bondholders' approvals for Sumatec to repay part of the facilities from the proceeds received from a sale and purchase agreement dated 21 December 2012 executed among Setinggi, Sumatec, HLCL and Ebony Ritz Sdn Bhd (read together with a supplemental deed dated 28 May 2013) ('SISB SPA') and the bondholders' approvals for Sumatec to sell and transfer the 51% shares in SISB, both in accordance with the terms of the 2013 SA. The proceeds payable under the SISB SPA is RM18.8m.

[6] In the 2013 SA, Sumatec is liable to repay the following outstanding principal amounts of the facilities totaling RM80m. It is not disputed that the 2013 SA is secured by the followings:

(a) a charge of shares dated 15 December 2010 pursuant to which Sumatec charged all of its 51% shares in SISB as security for the facilities;

(b) a charge of shares dated 28 June 2013 executed by Setinggi, MTB, the issuers and Sumatec, pursuant to which Setinggi charged all 49% shares in SISB owned by Setinggi in favour of MTB;

(c) an assignment of dividends dated 6 June 2013 executed by MTB, the issuers and Sumatec, pursuant to which Sumatec agreed to assign to MTB, the dividends payable by SISB to Sumatec; and

(d) an assignment of proceeds dated 6 June 2013 executed by MTB, the issuers and Sumatec, pursuant to which Sumatec agreed to assign to MTB, all the purchase price payable by HLCL and Setinggi to Sumatec under the SISB SPA.

[7] Pursuant to the 2013 SA, the parties agreed at a settlement sum of RM56m which shall be settled in the manner as stipulated in cl 2.2.2 of the 2013 SA and summarised as follows:

	Description	**Amount (RM)**
Clause 2.2.2(a)(i)	First tranche cash settlement	1.8m
Clause 2.2.2(a)(ii)	Second tranche cash settlement	17m
Clause 2.2.2(b)	First tranche dividend	5.2m
Clause 2.2.2(c)	Second tranche dividend	6.9m
Clause 2.2.2(d)	Sumatec's shares valued at RM25.1m	25.1m
Total		**56m**

[8] The plaintiffs received full payments/issuance of shares under cll 2.2.2(a)(i), 2.2.2(b) and 2.2.2(d). However, the plaintiffs did not receive payment of the second tranche cash settlement under cl 2.2.2(a)(ii) and only received part payment of the second tranche dividend under cl 2.2.2(c).

[9] Following the non-receipt of the second tranche cash settlement and the second tranche dividend, the plaintiffs and Sumatec agreed to enter into the 2015 settlement agreement ('the 2015 SA'), which amongst others provide for the plaintiffs to seek their recourse in the 2013 SA. Sumatec has made a total payment of RM5,715,093.17 to the plaintiffs pursuant to the 2015 SA. According to the terms and conditions of the 2015 SA, among others, parties agreed for the settlement of the outstanding amounts under the facilities at RM24,516,084.79 (calculated as at 15 August 2014) subject to additional interest.

[10] MTB vide their solicitors' letters dated 11 October 2016 to Sumatec declared that Sumatec has defaulted under the provisions of the 2015 SA and demanded from Sumatec the total sum of RM23,288,457.48 together with interest thereon, to be settled within 14 days from the date of the receipt of the

letter. As Sumatec failed to comply with the demand stated in the said letter, MTB again vide their solicitors issued a letter dated 5 January 2017 to Sumatec, to terminate the 2015 SA and demanded RM72,333,945.10 being the full amount of the facilities outstanding as at 3 January 2017 and interest.

THE PLAINTIFFS CONTENTIONS

[11] It is the plaintiff's contention that the 2015 SA is valid and enforceable and based on cl 2.4 of the 2013 SA, due to the payment defaults under cl 2.2.2. of the 2013 SA in respect of the second tranche cash settlement and the second tranche dividend, the condition under the 2013 SA was not fulfilled. The plaintiffs contended that it is undisputed that Sumatec was liable at the material time for the balance sum under the facilities (ie the full sum under the facilities less the settlement sum of RM56m 'balance sum'), which entitled the plaintiffs to enforce their rights against Sumatec immediately.

[12] The plaintiffs submitted further that valid consideration exists under the 2015 SA whereby they have not exercise their rights under the 2013 SA against the parties therein including Sumatec for the said balance sum as Sumatec had agreed to settle the agreed amount under the 2015 SA to the plaintiffs. According to the plaintiffs, had Sumatec settled the agreed amount under the 2015 SA, Sumatec would only have to pay the sum of RM22,635,496.60 (the principal, being amount unsettled under the 2013 SA) and interests at that point in time at 6%pa calculated on daily basis, instead of the balance sum of RM24m (being principal outstanding under the facilities of RM80m less RM56m) and all applicable interests for the full outstanding under the facilities. Hence by executing the 2015 SA Sumatec is submitted to have been aware that if it had complied with the same and paid the agreed amount it would have received some reduction.

[13] The plaintiffs further referred to letters of Sumatec unmarked 'without prejudice' written to MTB to propose settlement of the amount remaining unpaid under the second tranche cash settlement and the second tranche dividend together with interest thereon, by itself or its nominee. Further, Sumatec has also made a total payment of RM5,715,093.17 to the plaintiffs pursuant to the 2015 SA without any complaints or issues raised regarding the enforceability of the 2015 SA. As such, it is the plaintiffs' contention that Sumatec at all material times accepted and admitted its obligations/liabilities to settle the sums unpaid under the 2013 SA and thereafter the 2015 SA.

[14] In addition, the plaintiffs contended that as documented in cl 5.1 (c) of the 2015 SA, Sumatec represented and warranted to the plaintiffs that the 2015 SA constitutes legal, valid and binding obligations of Sumatec and enforceable

in accordance with its terms. As such, Sumatec is to be estopped from claiming that the plaintiffs are not entitled to enforce their rights under the 2015 SA and/or that the plaintiffs have breached the obligations under the 2013 SA by failing to enforce their rights against HLCL and Setinggi.

[15] The plaintiffs further submitted that the onus falls on Sumatec to adduce evidence to challenge the statement of indebtedness/statement of accounts relied upon by the plaintiffs. The plaintiffs contended that aside from denying that the said sums are due and owing on the basis that Sumatec has fulfilled its obligations under the 2013 SA, Sumatec did not challenge the applicable interest rates and the calculation of the sums claimed by the plaintiffs and therefore Sumatec has not discharged such onus to show manifest error on the statement of indebtedness/statement of accounts.

[16] In regards to encl 12, the plaintiffs submitted that the crux of the amendments to Sumatec's defence and counterclaim that approval of Sumatec's shareholders in respect of the 2015 SA was not obtained went beyond its pleaded defence. It is the plaintiffs' case that the court must disregard the issue of the board's approval in determining both encls 4 and 12 as the shareholders' approval is not required under the 2015 SA as the 2015 SA concerns the repayment by Sumatec of its own debts under the facility agreements.

[17] It is the plaintiffs' case that there are no triable issues in the plaintiffs' claim herein and Sumatec has no defence whatsoever. It is the plaintiff's case that Sumatec's counterclaim against the plaintiffs is also without basis.

SUMATEC'S CONTENTIONS

[18] Sumatec in its defence and counterclaim summarily contended as follows:

(a) the 2015 SA is void for failure of consideration and as such is unenforceable;

(b) the plaintiffs are estopped from claiming for any rights or remedies other than those contemplated in the 2013 SA and that the plaintiffs have breached the obligations under the 2013 SA by failing to enforce the right against HLCL and Setinggi; and

(c) by way of the 2013 SA and the conduct of the plaintiffs, the plaintiffs are estopped from claiming the full sum under the facility agreements and that Sumatec has been fully released and discharged from any obligations under the facility agreements.

THE COURT'S FINDINGS

Enclosure 4 — application for summary judgment

[19] In determining the plaintiffs' application for summary judgment, the court is always reminded that the facts of the case must reveal a 'virtually uncontested' case. The burden of proof is on the defendant in summary judgment proceeding to not only raise issues, but also to show that the issues merit a trial. In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, the then Supreme Court by majority held as follows:

(1) In an application under O 14, the court has to be satisfied on affidavit evidence that the defence has not only raised an issue, but also that the said issue is triable. The determination of whether an issue is or is not triable depends on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. A complete defence need not be shown. The defence set up need only show that there is a triable issue.

(2) Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. Unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application.

(3) Where the issue raised is solely a question of law without reference to any fact or where the facts are clear and undisputed, the court should exercise its duty under O 14. If the legal point is understood and the court is satisfied it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'.

[20] Sumatec has contended that subsequent to the loans under the three facilities, it has then entered into several SA with the plaintiffs to which this court finds there are issues to be tried.

[21] It is undisputed that prior to the 2013 SA and 2015 SA the Kerisma 2010 SA, CapOne 2010 SA and the Prima Uno 2010 SA (ie the 2010 SA) were entered into with the respective issuers as a result of which Sumatec had charged 51% of its shares in SISB as security for the facilities. The 2010 SA were then superseded by the 2013 SA. It is Sumatec's main contention in its defence that the obligations under the 2013 SA is the only obligation that may

be enforceable (if any subject to the counterclaim) by the plaintiffs.

[22] The 2013 SA was executed between the plaintiffs, HLCL, SISB and Sumatec pursuant to a sale and purchase agreement entered into between Sumatec, HLCL, Setinggi and Ebony Ritz Sdn Bhd on 21 December 2012 ('the 2012 SPA'). Under the 2012 SPA, Sumatec had agreed to sell to HLCL, Setinggi and Ebony Ritz 64,496,272 shares that Sumatec held in SISB which accounts for the remaining 51% of Sumatec's shareholding in SISB. The shares were then charged by Sumatec to the Kerisma Bondholders, the CapOne Bondholders and the Prima Uno Bondholders ('the Bondholders') whose interests are represented by the plaintiffs.

[23] Under the 2013 SA, Sumatec was to sell to HLCL 2% of the shares held by Sumatec in SISB (first tranche sale shares) by the first completion date and Sumatec was to sell to Setinggi the remaining 49% of shares held by Sumatec in SISB (second tranche sale shares) by the second completion date pursuant to cl 2.1 of the 2012 SPA. As consideration for the purchase of the sale shares, HLCL was required to make payment and HLCL had guaranteed that Setinggi would pay the second tranche consideration. Pursuant to cl 3.6 of the 2012 SPA, HLCL and Setinggi had also undertaken to procure discharge of all the corporate guarantees provided by Sumatec in respect of the loans and facilities granted to the Semua Group and that HLCL and Setinggi would indemnify Sumatec against all claims, demands or suit made against Sumatec. Apparently, HLCL, Setinggi and/or Ebony Ritz failed to provide and/or refused to provide the guarantee.

[24] Sumatec submits that the reasons for the 2013 SA was entered was that there was a remaining RM80m of the principal borrowed still due and owing to the issuers by Sumatec under the facility agreements entered into by Sumatec with each of the second to fourth plaintiffs respectively. HLCL had proposed to purchase 51% shares in SISB from Sumatec which had been earlier charged as security for the facilities issued by the second, third and fourth plaintiffs. 2% of those shares that were to be purchased were to be transferred to Ebony Ritz Pte Ltd and the remaining 49% were to be transferred to Setinggi. It is the contention of Sumatec that the 2013 SA was entered to facilitate the sale of shares owned by Sumatec in SISB as settlement of the outstanding amounts due by Sumatec to the second, third and fourth plaintiffs in favour of the Bondholders who had approved the scheme of arrangement.

[25] Sumatec in its defence had contended that it had fulfilled its obligation under the 2013 SA with the remaining payment obligations owing by HLCL, Setinggi to the Bondholders and which arrangements were accepted by

the Bondholders through its direct dealings with HLCL and Setinggi. Sumatec further contended that it has fulfilled its obligations under cl 2.2.2(d) of the 2013 SA wherein Sumatec had issued new shares valued at RM25.1m under the proposed scheme of arrangement to MTB for the benefit of the Bondholders on 21 November 2013.

[26] Sumatec further raised the fact that it has also fulfilled cl 2.2.2 (a) (i) of the 2013 SA in respect of the first tranche sale shares on 9 April 2013. The Bondholders through MTB had received RM1.8m from HLCL for the purchase of 2% of SISB shares. The share transfer is stated to have been duly executed on 30 May 2013 and SISB's board of directors had passed a resolution on 19 July 2013 to resolve that the transfer of the 2,529,266 ordinary shares of SISB be approved with effect from the date of the duly executed share transfer form as a result of which the 2% SISB shares has been duly transferred to HLCL on 19 July 2013.

[27] By way of acceptance of the obligations that had been performed Sumatec in its defence contends that pursuant to the several Bondholders meetings and by way of cl 2.4 of the 2013 SA, the plaintiffs and the Bondholders had agreed to accept a lesser sum of RM56m as settlement of the outstanding principal amount due under the three facilities issued by the issuers and for the agreed sum to be borne by not only Sumatec but also by HLCL, Setinggi and SISB. The obligations in respect of the settlement sum are set out in cll 2.2.1 and 2.2.2 of the 2013 SA.

[28] Clauses 2.2.1 and 2.2.2 of the 2013 SA state as follows:

> 2.2.1. the Borrower is hereby permitted to sell its entire interest in the SISB Shares, representing 51% of the issued share capital of SISB, to HLCL, Setinggi or HLCL's nominee(s) for RM18,800,000.00 in cash as the purchase price (the 'Purchase Price')
>
> 2.2.2 the outstanding principal amount of RM56,000,000.00 of the Kerisma Facility, the CapOne Facility and the Prima Uno Facility shall be repaid by the Borrower as follows:
>
> (a) the Purchase Price shall be paid by HLCL, Setinggi or HLCL's nominee to the Trustee for the account of Bondholders, the CapOne Bondholders and Prima Uno Bondholders in the following manner:
>
> (i) RM1,800,000.00 shall be paid within 7 Business Days from the date the last approval being obtained from the Kerisma Bondholders, the CapOne Bondholders and Prima Uno Bondholders which is 31 January 2013, or the execution of the SISB Sale and Purchase Agreement, whichever is later, for the purchase of 2% of the SISB Shares;

(ii) RM17,000,000.00 together with interest thereon at the rate of 6% per annum (interest shall be payable half yearly) shall be paid within 24 months, or earlier, from the date the last approval is obtained from the Kerisma Bondholders, the CapOne Bondholders or Prima Uno Bondholders which is 31 January 2013 provided that, if any of the Dividends are not paid on the due dates, HLCL and Setinggi shall forthwith upon written notice by the Trustee, make payment of the balance purchase price of RM17,000,000.00 to the Trustee;

(b) RM5,200,000.00 shall be paid by SISB within 7 days from the signing of this Agreement as dividend payment to the Trustee, pursuant to the Assignment of Dividends, and in relation to this, the Borrower represents and confirms that SISB has declared Dividends to be paid to the Borrower and undertakes that such Dividends shall be paid without any deduction of taxes, costs or expenses;

(c) RM6,900,000.00 shall be paid by SISB on 30 September 2013, as dividend payment to the Trustee, pursuant to the Assignment of Dividends, and in relation to this, the Borrower and SISB represent and confirm that SISB has declared such Dividends to be paid to the Borrower and undertakes that such Dividends shall be paid without any deduction of taxes, costs or expenses;

(d) the Borrower shall issue by 31 July 2013, new shares, which shall be quoted and listed on Bursa Malaysia Securities Berhad, valued at RM25,100,000.00 under the Proposed Scheme of Arrangement, whereby each share shall have par value of RM0.14 and the issue will be at RM0.175 per share to the Trustee for the benefit of the Bondholders, and upon issuance of such shares, the obligations of the Borrower under the Facilities, shall be deemed settled to the extent of such sum.

[29] It is of the considered view that the issue to be tried is whether the plaintiffs are estopped from claiming the full sum of the three facilities as the proceedings now before this court also involved HLCL and Setinggi by way of counterclaim filed by Sumatec. Further, the question arise whether the plaintiffs had entered into the 2013 SA with full knowledge of the 2012 SPA which can be gleaned from the terms of the 2013 SA.

[30] It is further contended by Sumatec that HLCL and Setinggi had initiated the purchase and transfer of the first tranche sale shares without requiring Sumatec to obtain the prior consent from the bondholders. Thus, the issue is whether HLCL and Setinggi had caused a waiver and/or variation of Sumatec's obligations under the conditions precedent set out in the 2012 SPA vis a vis the obligation to obtain the Bondholders' consent for the sale and transfer of the sale shares.

[31] The issue of whether Sumatec's has been fully released and discharge

from any obligations under the facility agreements by way of the 2013 SA is an issue to be tried as Sumatec has further averred that on 31 January 2013 a director and sole shareholder of Setinggi by the name of Teh Teong Lay who was also serving as HLCL's Group financial controller had notified Sumatec in an email that the Bondholders had given their consent in respect of the sale and transfer of the first tranche sale shares and that by the same email, he had requested Sumatec to transfer the first tranche sale shares to HLCL. It is revealed that on 3 April 2013, Teh Teong Lay had obtained confirmation in writing from MTB who is acting on behalf of the bondholders that it would issue an undertaking to release the first tranche sale shares within seven business days from the receipt of the purchase price of the first completion shares, being RM1.8m. On 5 April 2013, MTB had issued the letter of undertaking.

[32] Sumatec now contends that HLCL, Setinggi and/or HLCL's nominees thereafter, failed to fulfill cl 2.2.2(a)(ii) of the 2013 SA in breach of their undertaking, representation and warranty to MTB as set out in cll 4.3 and 4.4. of the 2013 SA and as such Sumatec is not obligated to pay the amounts to the plaintiffs. Further in respect of the sum of RM17m and the dividends due to the plaintiffs under the 2013 SA, that obligation is said to be borne by HLCL, Setinggi and/or HLCL nominees where under the default clause as set out in cl 3.1 of the 2013 SA, provides amongst others that the sum of RM17m shall be recoverable from HLCL and Setinggi and the dividends shall be recoverable from SISB. The question is then whether the plaintiffs should have sought their remedies for the breach of obligations by HLCL, Setinggi and SISB under cl 3.4 of the 2013 SA which reads as follows:

> 3.4 The Bondholders hereby agree that in the event that the Borrower, Setinggi and/or SISB shall fail to observe or perform or otherwise be in breach of any of the provisions of this Agreement or the Security Documents, the Kerisma Bondholders, the CapOne Bondholders, and the Prima Uno Bondholders are entitled to separately instruct the Trustee to enforce this Agreement and the Security Documents, and upon the receipt of such instructions, the Trustee shall forthwith notify the other Bondholders. Any such instructions shall be binding on the Trustee and the Bondholders.

[33] When there is averment of direct dealings by the plaintiffs with representatives of HLCL and/or Setinggi the question is whether Sumatec can be made responsible for the sums due since under cl 5.4(c) and 5.5(c) of the 2013 SA when HLCL and Setinggi had undertaken to procure SISB to, inter alia, pay the SISB Dividends. Further issues to be tried arise when Sumatec contends that on 2 October 2013, HLCL had assumed SISB's obligation to pay the second Tranche Semua International Dividend as one Kuah Geok Lin (acting on behalf of HLCL and Ebony Ritz) had written to Sumatec and MTB

to request for an extension of time to pay the second Tranche Semua International Dividend to the first plaintiff owing to a cash-flow issue. On 6 November 2013, Teh Teong Lay on behalf of HLCL and Setinggi had notified MTB via email that HLCL and/or SISB had made part payment to MTB in respect of the second Tranche Semua International Dividend. On 8 November 2013, MTB had confirmed that it had received the partial dividend payment of RM610,704 out of RM6.9m for the second Tranche Semua International Dividend from HLCL and/or SISB. On 30 December 2013, Kuah Geok Lin (acting on behalf of HLCL and Ebony Ritz) had once again requested for an extension of time to pay the remaining second Tranche Semua International Dividend citing cash flow constrain. HLCL, Setinggi or SISB have not paid and/or procured their obligations to MTB for the remaining payments of dividends pursuant to cl 2.2.2(c) of the 2013 SA.

[34] The defence of estoppel by Sumatec is an issue to be tried to determine whether the plaintiffs have agreed to waive the obligations of Sumatec for the full amounts due under the facilities issued by the second, third and fourth plaintiffs by entering into the 2013 SA with HLCL, Setinggi and SISB. As to the plaintiffs' contention that Sumatec had admitted to the execution of the various undisputed agreements entered into between the plaintiffs and Sumatec, this court finds that Sumatec has never admitted to the amount that is being claimed by the plaintiffs in this proceeding. As such the debt said to be due and owing to the plaintiffs has not been admitted by Sumatec and therefore it is not appropriate for summary judgment to be entered against Sumatec without a trial on its merits. The issue of whether the 2013 SA has been waived or varied for that matter must be tried by the court by calling witnesses from HLCL and Setinggi whom Sumatec has added as the defendants in the counterclaim.

[35] It is the plaintiffs' submission that the full sum due under the facilities are being claimed under the 2015 SA solely and it is independent of the 2013 SA. The plaintiffs relied on the default clause reflected in cl 4.1 which states as follows:

> 4.1 In the event that the Borrower shall fail to observe or perform or otherwise be in breach of any of the provisions of this Agreement or Security Documents, the Issuers and/or Trustee shall be entitled (at the Issuers' and/or Trustee's sole discretion), at the cost and expense of the Borrower, to terminate this Agreement, in whole or in part, forthwith without any prejudice to any rights or remedy the Issuers and/or Trustee may have for damages as a result of such failure and/or breach and further without prejudice to any right or remedy the Issuers may have under the Facility Agreements, this Agreement, the 2013 Settlement Agreement, the Security Documents and any law. For the avoidance of doubt, in the event of a breach of any of the provisions of this Agreement, the Issuers are entitled to recover from the

Borrower the full sum of the Facilities, outstanding together with all interest and default interest thereon in accordance with the Facility Agreements.

[36] Since cl 4.1 of the 2015 SA provides for the plaintiffs to seek recourse in the 2013 SA amongst others, the issues that need to be tried is whether the 2015 SA should be viewed in light of the circumstances in which the 2013 SA was entered into by the plaintiffs. At this juncture, it is of the considered view Sumatec's contention that if the 2013 SA was never meant to be a recourse that the plaintiffs should pursue, it would not have been provided for in the default clause, merits a trial. It could be gleaned from Sumatec's defence that it has always been the intention that in the event that the 2015 SA is terminated or there is a breach, parties would then revert to the terms in the 2013 SA. This can be seen from the multiple references to the 2013 SA in the 2015 SA such as follows:

(a) cl 4.1, 4,2 and 4.3 of the 2015 SA which are the default clauses;

(b) cl 5.2.of the 2015 SA where it states, inter alia, that Sumatec undertakes that:

> it shall continue to comply and observe all the obligations imposed on it under the facilities, the Facility Agreements, the 2013 SA and the Security Documents;

(c) cl 6.1 of the 2015 SA where it states that:

> notwithstanding anything to the contrary in this Agreement, all conditions, covenants, provisions, powers and terms contained in or subsisting in relation to the Facility Agreement, 2013 SA and Security Documents shall remain in full force and effect until after the Trustee, for the accounts of the Bondholders, has received full payment of all amounts stipulated under Clause 3.1 above and upon full discharge of the Borrower of its obligations under this Agreement and any remaining obligations under the 2013 Settlement Agreement;

(d) cl 6.2 of the 2015 SA which states that:

> for the avoidance of doubt, nothing contained in this Agreement shall prejudice or affect the right and entitlement of the Issuers and Trustee under the Facility Agreements, 2013 Settlement Agreement and Security Documents;

(e) cl 7.1 of the 2015 SA, where it states that:

> No failure on the part of the Issuers and/or the Trustee in exercising nor any omission to exercise any right, power, privilege or remedy accruing to the Issuers and/or the Trustee upon any default or breach by the Borrower shall impair any right, power, privilege or remedy available to the Issuers and/or the Trustee under the Facility Agreements or the 2013 SA or the Security Documents or this Agreement or any law or be construed as a waiver thereof

or acquiescence in such default or breach.

[37] It is of the considered view that in light of the above clauses in the 2015 SA, it cannot be gainsaid that this is a straightforward case in relation to the construction of just one clause. Evidence need to be led as to the circumstances as to why Sumatec and the plaintiffs have entered into the 2015 SA together with the construction of the terms of both the 2013 and 2015 SA. Further evidence need to be led as to the alleged conduct by the plaintiffs whether such conducts demonstrate any variations or waiver to which Sumatec is said to have performed its obligations. Sumatec's position needs to be ascertained via a trial to determine whether there has been a failure of consideration in the 2015 SA and in the event of a breach of the same, the parties are to revert to the obligations as set out in the 2013 SA. As such this is not an appropriate case for summary judgment as it is not a case where the plaintiffs' claims are uncontested. There are serious triable issues which warrant a full trial.

Enclosure 12 — The striking out application

[38] It is trite that an application for striking out should only be allowed where the defence and counterclaim are obviously unsustainable. In *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, the Supreme Court held:

> (1) The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the Rules of the High Court 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'. It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence.

[39] In *Khairy Jamaluddin v Dato' Seri Anwar bin Ibrahim* [2013] 4 MLJ 173 the Court of Appeal has stated that the principles governing a summary application under O 14 proceedings extends to applications under O 18 r 19 as both applications are summary in nature. The Court of Appeal stated as follows:

> [14] In our judgment, the aforesaid principle of law pronounced by our Supreme Court in *Bank Negara Malaysia v Mohd Ismail & Ors* is not limited in its application to O 14 proceedings but extends to applications under O 18 r 19. We opine to this effect because both applications are summary in nature ...

[40] The plaintiffs rely on the same issues raised in the summary judgment application. It is of the considered view that the plaintiffs have failed to demonstrate that Sumatec's defence or the counterclaim are clearly unsustainable.

[41] The fact remains that the amount said to be due and now being claimed by the plaintiffs is contested. The terms of the 2015 SA are obviously in dispute. If the plaintiffs' contention that consideration of the 2015 SA was a reduced or a lower settlement sum due and owing, the issues to be tried is whether the purported breach by Sumatec leads to the parties having to enforce the obligations under the 2013 SA as references to the 2013 SA in the 2015 SA are too frequent and obvious that it cannot be ignored by the court. The issues at hand are whether by way of the 2013 SA and the 2015 SA, the plaintiffs have waived any amount more than the settlement sum as agreed to in the 2013 SA and whether Sumatec has fulfilled its obligations as set out therein. Further question is whether it is within the contemplation of the parties that any failure to fulfil the obligations under the 2015 SA must necessarily mean that the terms of the 2013 SA will then be reverted to. Sumatec had contended that the plaintiffs are bound by the 2013 SA wherein Sumatec claimed that it has performed its obligations under cl 2.2.2 of the 2013 SA and that the plaintiffs and the Bondholders have agreed by way of cl 2.4 of the same that any principal amount above the settlement sum has been waived.

[42] It is appropriate that Sumatec's factual contention especially in respect of the circumstances in which the 2015 SA was entered into and the alleged waiver by the plaintiffs in respect of Sumatec's obligations by way of the 2013 SA should be tried as it will most definitely involve conflicting evidence.

[43] It is of the considered view that the application for striking out the defence and/or the counterclaim cannot be sustained for the same reasons and based on the facts and issues alluded to and set out earlier in the summary judgment application. The counterclaim against the plaintiffs will be the consequent to the success of the defence and should not be struck out for the same reasons.

CONCLUSION

[44] Premised on the discussions alluded to in the above and for the same factual contentions and issues of law raised, both the summary judgment and the striking out applications were dismissed with costs. This is not an appropriate nor plain and obvious case to allow the plaintiffs' applications without a full trial.

Both summary judgment and striking out applications dismissed.

Reported by Ashok Kumar